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Ann C. House v. Armour of America, Inc., Lawco Police Supply, E.I. DuPont de Nemours : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANN C. HOUSE, individually and as the Personal Representative of the Estate of Freddie Floyd House, Plaintiff and Appellant, vs. ARMOUR OF AMERICA, INC., a California corporation, LAWCO POLICE SUPPLY, a Utah corporation, E.I. DuPONT de NEMOURS, a Delaware corporation, and JOHN DOES III through XX, Defendants and Appellees.	930552CA Case No. 930552-CA Priority No. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM FINAL ORDER AND JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT, PRESIDING

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PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case on appeal contains the names of all parties to the proceeding in the court below.

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INTRODUCTION

This is an appeal from a summary judgment. To prevail, the appellant only has to show that there was a genuine issue of material fact that precluded a judgment for the defendants as a matter of law. See Utah R. Civ. P. 56(c). Because summary judgment denies a party the opportunity to present his or her case on the merits, in deciding whether the trial court correctly found that there were no genuine issues of material fact, this court must view the facts and inferences to be drawn from them "in the light most likely to create factual questions" and construe them "against the party who bears the burden of proving that summary judgment was appropriate" (in this case, the defendants). Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 844 P.2d 322, 324 n.1 (Utah 1992). The court must construe any doubts or uncertainties about issues of fact in favor of the appellant. Hill v. State Farm Mut. Auto. Ins. Co., 765 P.2d 864, 866 (Utah 1988). It is not the court's role to weigh the evidence. It does not matter that the evidence on one side may appear stronger than the evidence on the other side or may even be "compelling." Hardy v. Prudential Ins. Co. of Am., 763 P.2d 761, 765 (Utah 1988). If there is any evidence to support the plaintiff's contentions, then the summary judgments must be reversed. It takes only one sworn statement to create a genuine issue of material fact. Id.

The two central issues in this case were, What did Lt. House know about the limitations of his vest? and Would it have made any difference if the defendants had adequately warned him of his vest's limitations? Because Lt. House is dead--the victim

of a bullet that went through his so-called bulletproof vest--no one can say for sure what he knew or whether he would have acted differently had he been adequately warned. Only a jury can answer those questions, by drawing inferences from the evidence. The record contained conflicting evidence on virtually every material fact in this case. The defendants argue the evidence favorable to their positions but gloss over or totally ignore evidence giving rise to contrary inferences. On motions for summary judgment, the trial court was required to draw those inferences. Because the evidence raised genuine issues of material fact, the defendants were not entitled to summary judgment. The defendants' arguments, based on their selective reading of the evidence, are properly addressed to the trier of fact and not this court.[1]

ARGUMENT

I.

WHETHER THE DEFENDANTS' FAILURE TO WARN WAS A PROXIMATE CAUSE OF LT. HOUSE'S DEATH WAS A GENUINE ISSUE OF MATERIAL FACT.

A. The Plaintiff Was Entitled to a Heeding Presumption.

The defendants argue that they were entitled to summary judgment because the plaintiff could not show that their failure to warn caused Lt. House's death. Under the facts of this case, the trial court should have applied a heeding presumption, which would

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[1] Because the deposition testimony the defendants rely on does not give a complete picture of the facts of this case, the plaintiff has included copies of the deposition testimony cited in this reply brief in an addendum filed herewith. Deposition testimony is cited by a reference to the record and the name of the deponent.

have met the plaintiff's burden of establishing a prima facie case of causation and, unless rebutted as a matter of law, would have gotten her by a summary judgment motion. See, e.g., O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1442 (10th Cir. 1987), cert. denied, 486 U.S. 1032 (1988); Webb v. Rodgers Mach. Mfg. Co., 750 F.2d 368, 373 (5th Cir. 1985); Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038, 1057 (Kan.), cert. denied, 469 U.S. 965 (1984).

The defendants claim that the heeding presumption does not arise until the plaintiff (1) shows that the product inflicted the injury, and (2) points to some act leading to the injury "which indisputably was taken and which an adequate warning would have prevented." Armour Brief at 24.[2] No case the plaintiff has found has ever recognized these so-called elements as prerequisites for the heeding presumption to apply, and, in fact, courts have applied the presumption where neither "element" was present. See, e.g., Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700, 716-17 (5th Cir. 1986). If the plaintiff were always required to show some act leading to the injury that an adequate warning would have prevented, there would be no need for a heeding presumption. The plaintiff already has the burden of proving that an adequate warning may have prevented the harm by altering the product user's conduct. See, e.g., Ferlito

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[2] The defendants first claim that the presumption applies primarily in drug cases. In fact, courts have applied the presumption in cases involving a variety of products, including an air compressor, Vickers v. Chiles Drilling Co., 882 F.2d 158 (5th Cir. 1989), a grain bin, Grover Hill Grain Co. v. Baughman-Oster, Inc., 728 F.2d 784 (6th Cir. 1984), and, as in this case, protective clothing, Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700 (5th Cir. 1986).

v. Johnson & Johnson Prods., Inc., 771 F. Supp. 196, 199 (E.D. Mich. 1991), aff'd, 983 F.2d 1066 (6th Cir. 1992). The defendants' second "element" merely restates the plaintiff's burden. The purpose of the heeding presumption is to ease the plaintiff's burden of proof. The heeding presumption excuses the plaintiff from having to present direct evidence to prove how Lt. House would have acted differently had he been adequately warned. See Cunningham v. Charles Pfizer & Co., 532 P.2d 1377, 1382 (Okla. 1975).[3]

The defendants claim that the heeding presumption does not apply in Utah. The only Utah case they cite, Barson v. E.R. Squibb & Sons, 682 P.2d 832 (Utah 1984), is inapposite. The heeding presumption only applies in strict products liability cases, and the court in Barson did not have to reach the plaintiff's strict liability claims. See 682 P.2d at 835 & 837. The only issue in Barson was whether there was sufficient evidence to sustain a jury verdict for the plaintiff on negligence grounds, and the court held that there was. The plaintiff did not have to rely on any presumption, and there is no indication that anyone even argued the heeding presumption.

The defendants also claim that a number of courts have rejected the heeding presumption. The only case they have cited squarely rejecting the presumption is Riley

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[3] Although the defendants have misstated the plaintiff's burden, there was evidence to satisfy their second "element." The evidence showed that, when Lt. House released his dog, the dog hesitated, Lt. House stepped out to encourage the dog, and then got shot. R. 4011 (Fowlke). Whether Lt. House would have stepped out if he'd been adequately warned was for the jury to decide.

v. American Honda Motor Co., 856 P.2d 196 (Mont. 1993).[4] In fact, the vast majority of jurisdictions that have considered the issue have adopted a heeding presumption.[5] That is because the heeding presumption best comports with the policies underlying strict products liability. See, e.g., Coffman v. Keene Corp., 628 A.2d 710, 717-20 (N.J. 1993).[6] Often, as in this case, the user of the product is no longer around to say what difference an adequate warning would have made. As a matter of policy, any uncertainty over whether an adequate warning would have made any difference should be borne by the party creating the risk, that is, by the party that failed to give an adequate warning, and not by the innocent plaintiff. Courts have therefore shifted the burden to the defendant to show that a different warning would not have made any difference.

The defendants claim, without any authority for their position, that the presumption alone does not meet the plaintiff's burden. That is precisely the effect of the presumption. It meets the plaintiff's initial burden of establishing a prima facie case of

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[4] In two of the cases cited--Raney v. Owens-Illinois, Inc., 897 F.2d 94, 95 (2d Cir. 1990), and Cotton v. Buckeye Gas Prods. Co., 840 F.2d 935, 942 n.3 (D.C. Cir. 1988)--federal courts applying state law simply concluded that there was no decision of the state's highest court adopting the heeding presumption. None of the other cases even mention the presumption.

[5] In addition to the cases cited in the Brief of Appellant at 39-40 and in Armour's brief at 23 n.6, see also Coffman v. Keene Corp., 628 A.2d 710, 719-20 (N.J. 1993), and Riley, 856 P.2d at 201 (McDonough, J., dissenting), and cases cited therein.

[6] Common sense also suggests that, if a person is properly warned about the dangers associated with the use of a product, he or she will generally heed the warning.

causation and can get the plaintiff to a jury. See Utah R. Evid. 301 & advisory comm. note;[7] Cunningham, 532 P.2d at 1382.

The defendants also argue that the presumption is rebuttable and suggest that the presumption was rebutted in this case because the evidence showed that all the officers at Marion tried to minimize the risks to which they were exposed. However, the fact that there may have been some evidence to rebut the presumption does not mean that the defendants were entitled to summary judgment. Unless the court could say as a matter of law that the presumption was rebutted--that is, unless from the evidence reasonable minds could reach only one conclusion as to whether an adequate warning would have made any difference--summary judgment was inappropriate. See Koonce, 798 F.2d at 716-17.[8] As shown below, there was evidence from which a jury could reasonably conclude that a more adequate warning would have made a difference in this case. It was therefore for the jury to decide whether the heeding presumption had been rebutted.

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[7] The defendants claim that rule 301 does not apply because it does not "involve the heeding presumption." Rule 301 states the effect of presumptions generally under Utah law; it makes no exception for the heeding presumption.

[8] Koonce is remarkably similar to this case. The plaintiffs' decedent in that case was fatally injured in a flash fire at the ammunitions plant where he worked. His survivors brought a products liability action against the manufacturer of the safety suit he was wearing at the time of the fire. The manufacturer claimed that, because the decedent was required to wear the safety suit at all times, any failure to warn him of the suit's limitations could not have caused his death. The court held that, while the manufacturer had produced sufficient rebuttal evidence to create a jury issue, it did not establish as a matter of law that the decedent would not have heeded a warning: "reasonable jurors could disagree over the effect a warning would have had on Koonce's actions." 798 F.2d at 717. Similarly, reasonable jurors could disagree over the effect a warning would have had on Lt. House's actions. See infra pt. I.B.

B. The Evidence Raised a Genuine Issue of Material Fact As to Whether or Not a Proper Warning Would Have Made a Difference.

The defendants claim that they were entitled to summary judgment because there was no evidence that Lt. House or any other officer at Marion knowingly exposed himself to rifle fire in reliance on his vest.[9] In fact, one could conclude that Lt. House did knowingly expose himself at least to the potential for hostile fire.[10]

In any event, the defendants have overstated the plaintiff's burden. All the plaintiff had to do to raise a jury question as to causation was to produce enough evidence to support a reasonable inference that a warning may have prevented Lt. House's death. See, e.g., Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1195 (3d Cir. 1987).

The defendants claim that the arrest plan was designed to minimize exposure to hostile rifle fire and that Lt. House did nothing that deviated from the plan. The arrest plan, however, was formulated in general terms. Lt. House's role was to release his dog from the Bates house at a certain time. R. 2390-91, 4141-42 (Pope). Lt. House was not

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[9] The defendants claim that the plaintiff "admits there is no evidence" that Lt. House did anything in reliance on his vest. In fact, the plaintiff only said there was no direct evidence that Lt. House would have done anything differently. Brief of Appellant at 39. That is because Lt. House is dead and can't say what he would have done differently. But even if Lt. House were alive and testified that he would have acted differently had he known his vest's limitations, it would still be up to the jury to decide what difference, if any, an adequate warning would have made.

[10] Although there was a conscious effort to minimize any exposure to hostile fire, R. 1383-84, the officers knew that the Swapps had rifles, R. 2394 (Pope), and knew there was a risk of being shot at, R. 4143 (Pope). Moreover, the plan called for Lt. House to be totally exposed to any hostile fire when he released his dog. R. 2392-93 & 4218 (Pope).

told everything to do or precisely where to stand. Lt. House only needed to change his position a matter of inches and the result would have been different. If the defendants' failure to warn Lt. House of his vest's limitations gave him a false sense of security that caused him to be slightly more exposed than he otherwise would have been, that was enough for the defendants' failure to warn to be a cause of Lt. House's death.

There was sufficient evidence at least to raise a genuine issue of material fact as to whether the defendants' failure to warn made any difference in Lt. House's actions. Lt. House's co-workers testified that they alter their behavior based on their knowledge of their equipment's limitations. R. 2739 (Billings); 4239 (W. Jorgensen); 4333 (Roberts); 4639-40 (L. Jorgensen). The evidence showed that Lt. House relied on his vest, R. 4287 (W. Jorgensen); R. 4073 (Fowlke), was more confident with his vest on, R. 2738 (Billings), and felt "he had the protection that would" enable him to stay alive, R. 4242 (W. Jorgensen). The evidence also showed that Lt. House acted differently on other occasions because of his vest. E.g., R. 2801-2 (Minor); 4232 (W. Jorgensen); 4368 (Roberts). Lt. House's co-workers testified that, when he was wearing his vest, he though he was a superman, R. 4232 (W. Jorgensen); 4368 (Roberts), and "figured he was pretty well indestructible," R. 2659 (Bartell). See also R. 2802 (Minor) ("To answer the question of saying that he thought he was God, I would say somewhere in between the spectrum he did").[11]

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[11] The defendants argue that evidence that Lt. House acted differently on other occasions is irrelevant because reliance in general is not the issue; the plaintiff must show that Lt. House acted differently on January 28, 1988, when he was killed. However, a

The defendants claim that all the officers were exposed to risk and that their exposure was the result of the arrest plan and not any reliance on vests. While all the officers in the Bates house were exposed to rifle fire to some extent, they were not all exposed to the same degree. Lt. House was the only officer who was totally exposed, who had no concealment. He was even exposed more than Officer Pope, the other dog handler, who played a similar part in the arrest plan.[12] The plan was for Lt. House to go in front of Officer Pope. R. 2393 (Pope). One could reasonably infer that that was because Lt. House was the one who was supposed to have the "Cadillac" of vests. See R. 2610 (Bartell) & 4004 (Fowlke). And Lt. House was the only officer in the Bates house to get hit. If Lt. House had fully appreciated the limitations of his vest and therefore been a little less bold or shifted his position ever so slightly, he would still be alive today. Thus, a jury could reasonably conclude that an adequate warning would have made a difference.

The defendants claim that it is irrelevant that Officer Pope was less exposed than Lt. House because none of the law enforcement officers who formulated the plan

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jury could reasonably infer that, if Lt. House acted more boldly and with less regard for his own safety on other occasions because of his misplaced faith in his vest, he may have acted that way on January 28. And on motions for summary judgment, the trial court was required to draw that inference. Frisbee v. K&K Constr. Co., 676 P.2d 387, 389 (Utah 1984).

12 The defendants suggest that Officer Pope was exposed to the same risks as Lt. House, but there is substantial evidence that Officer Pope was behind (and therefore shielded by) Lt. House. See R. 2393, 4149, 4175-76 & 4218 (Pope).

anticipated any fire from the Singer house.[13] The fact that the officers adopted a plan that they thought minimized their exposure to rifle fire does not mean that the defendants' failure to warn officers of their vests' limitations was not a contributing factor in Lt. House's death. The actions anyone takes to minimize the risks to which he is exposed depend on the risks that he foresees, which, in turn, depends both on the risks that others pose and the protection the person thinks he has. A person who does not know of a risk will act differently than if he were aware of it. One could infer that Lt. House acted differently than he otherwise would have acted because he thought he had more protection than he had.

One could also infer that, had Lt. House known the limitations of his vest, he would not have participated in the arrest plan, or that, if all the officers fully appreciated the limitations of soft body armor, a different plan would have been chosen.[14] Cf. Raney, 897 F.2d at 96 (a jury could reasonably conclude that if a person had been

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[13] In fact, there was evidence that the officers did anticipate fire from the Singer house. See R. 4204 (Pope) (the officers knew there was a potential of someone shooting at them from the Singer house because they had discussed it before) & 4142 (Pope) (before the officers were to come out of the Bates home, armored personnel carriers were to go between them and the Singer home).

[14] The defendants claim that there is no evidence to support the plaintiff's assertion that everyone at the siege thought his vest gave him some protection against rifle fire, even though Lt. House's vest was the only one with a plate. Admittedly, Officer Pope knew his vest would not protect him from rifle fire, because the label on his vest said just that. R. 2383. But the officers knew Addam Swapp was carrying a rifle, R. 2394 (Pope), and they all wore vests, R. 4184 (Pope). Moreover, there was evidence that their vests were soft body armor, not the vests with the hard armor insert like Lt. House's. R. 4546-47 (Miller). One could infer, then, that the FBI officers mistakenly thought their vests gave them some protection from rifle fire.

warned of the dangers of asbestos he would have sought other employment, or his union would have taken action to protect him).

The defendants claim that Lt. House could not have relied on his vest because his vest gave him only limited protection--it only covered his torso.[15] But that is exactly where Lt. House was shot. The risk Lt. House thought he was protected from was the very risk that materialized. The fact that Lt. House knew he could get shot in the head may have meant he was more cautious than he would have been without a vest but it does not mean that he did not rely on his vest. Cf. Price v. Tempo, Inc., 603 F. Supp. 1359, 1365 (E.D. Pa. 1985) (fire fighter relied on his protective clothing to protect him even though it did not cover his entire body).[16] A product user has a right to decide whether

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[15] The defendants use the same argument to claim that they had no duty to warn because the vest's limitations were readily apparent. However, it was not readily apparent to Lt. House or any of the other officers that Lt. House could be killed by a bullet that actually hit the plate. See, e.g., R. 4178 (Pope). The issue is not whether Lt. House knew his vest did not provide complete protection but whether or not he thought his vest provided him more protection than it did, and there was sufficient evidence from which a reasonable jury could infer that Lt. House did not sufficiently understand his vest's limitations. See, e.g., R. 2659 (Bartell) (after Lt. House received his vest, "he figured he was pretty well indestructible"); 4240 (W. Jorgensen) (he thought his vest was "pretty much indestructible").

[16] The defendant's argument is like saying that, because a water skier could be struck by lightning, he doesn't rely on his life preserver when he water skis. Taken to its extreme, the defendants' argument would discourage law enforcement officers from wearing vests at all. In fact, DuPont learned that officers were not wearing vests, partly because they figured, "Since the bad guys know that police wear body armor they now shoot at the head rather than the torso." R. 1614. The defendants undertook to educate officers that they were more likely to be hit in the torso than the head. A jury could conclude that the defendants' efforts had the desired effect on Lt. House and that he accordingly discounted the possibility of being killed by a shot to an unprotected part of his body.

to expose himself to a particular risk. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). He can't make that determination unless he knows all the relevant factors. If Lt. House thought his vest eliminated a great deal of the risk, one could reasonably conclude that he acted differently than he would have if he had known his vest did not give him the protection he thought he had.

Even if Utah did not follow the majority of jurisdictions that have applied a heeding presumption in a case like this, one could still infer from all the evidence that the defendants' failure to warn Lt. House about his vest's limitations was a cause of his death. See Raney, 897 F.2d at 95-96 (causation can be inferred from the circumstances). The evidence at least raised a genuine issue of material fact as to causation. Cf. id. at 96 (where there was some evidence that the plaintiff's decedent would have adjusted his conduct if he had been warned, it was for the jury to decide whether to draw the inference that an adequate warning would have made a difference).

II.

WHETHER OR NOT LT. HOUSE KNEW THE LIMITATIONS OF HIS VEST WAS A DISPUTED ISSUE OF FACT.

The defendants claim that Lt. House knew that his vest alone would not stop rifle fire. The plaintiff's claim is not simply that Lt. House did not know that his vest would not stop rifle fire but that he was not adequately warned of his vest's limitations. See R. 82-98, 1276-77. But even the narrow issue of whether Lt. House knew his vest would

not stop rifle fire presented a genuine issue of material fact. Lt. House is dead and can't say what he knew or didn't know. One can only infer what he knew from other evidence, and reasonable minds could reach different conclusions from the evidence.

The defendants claim that Lt. House must have known the limitations of his vest because the SWAT team of which he was a member conducted an "extensive investigation" of soft body armor before the vests were bought. The evidence, however, shows that this "extensive investigation" consisted primarily[17] of talking to sales people and reading sales literature in the members' spare time.[18] For example, Steve Minor, the SWAT team's equipment officer, testified that he relied on sales brochures and distributors explaining what their products would do. R. 2762, 2765. Karl Bartell testified that the way they got equipment was to look at catalogs from suppliers and listen to sales representatives who were trying to sell them things. R. 2676-77. See also R. 2517, 2514-15, 3274 (T. House); R. 4602-4 (L. Jorgensen). But the kind of literature they had was restricted to "[s]ales literature," R. 2527-28, 3274 (T. House), and the people who taught them about vests "were company representatives that were selling

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17 The defendants accuse the plaintiff of misleading the court into thinking that the investigation consisted "only" of sales presentations. The plaintiff never said that that was the only way the SWAT team acquired information. They also spoke with allied agencies. R. 2514-15 (T. House). But their number one source of information was sales pitches.

18 When the SWAT team's vests were bought (and until about 1986 or 1987), the SWAT team was part time. R. 2593-94 (Bartell). All the team members had other assignments; SWAT was something they did in their spare time. R. 4602-3 (L. Jorgensen); R. 2482-83 (T. House). Any investigation of equipment they did was volunteer work, on their own time. R. 4377, 4395 (Roberts).

vests," R. 2606 (Bartell). See also R. 2650-51 (Bartell) (they "had to had to take peoples' representation, peoples' selling skills saying 'This is what happens'").

The SWAT team's investigation was very informal. R. 2514 (T. House). One member described it as "scrounging around" for equipment. R. 4607 (L. Jorgensen). It did not adequately educate the team about vests. For example, Richard Billings testified that they did not have "much information at that time on vests"; they were "kind of a new item for us." R. 2701. They kept all the information they gathered in a manila folder, and "[i]t wasn't very thick." R. 4376 (Roberts). Will Fowlke, another one of the "main players" in the team's investigation, see R. 2520 & 3165 (T. House), could not recall getting into specifics about what the vests would protect against (other than it was generally understood that Fred's vest with the plate would stop a 30.06 at point-blank range). R. 3967, 4058, 4062 (Fowlke).

The defendants suggest that Lt. House must have seen an Armour brochure in the course of the SWAT team's investigation. Although it is possible that he saw one, there is no direct evidence that he did. None of the SWAT team could specifically recall seeing an Armour brochure.[19]

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[19] The defendants claim that the testimony is "uncontradicted" that all Armour vests come enclosed in a plastic cover with an Armour brochure. In fact, SWAT team members testified that no brochures were enclosed in the plastic covers for their vests, R. 2531-32 (T. House); 4270 (W. Jorgensen), and Lawco's principals could not recall any information other than the label accompanying the Armour vests. R. 3333 (Wadman) & 3444-45 (Carlson). The defendants further accuse the plaintiff of misleading the court when she stated on page 37 of her brief that only two members of the team recalled seeing a brochure and, on page 38, that only one member recalled seeing a brochure. The plaintiff admits her references to "brochure" were misleading, taken out of context

Even if Lt. House saw an Armour brochure, that would not have adequately warned him of his vest's limitations. Armour claims its brochure adequately warned users that the plate was necessary to stop rifle fire, but at least one member of the SWAT team reading the brochure thought that the vest without the insert should stop some rifle fire. R. 3945-46 & 4090-91 (Fowlke). As he noted, the brochure does not say the plate is necessary to stop any rifle fire; it just says a tactical vest "accepts the new hard armour inserts which upgrade its ability to stop high velocity, large caliber rifle attack." R. 1325 (emphasis added).

The defendants also claim that the brochure includes a chart showing the handgun rounds tactical vests will stop and the rifle fire the insert will stop. The chart, however, does not say that the insert is necessary to stop rifle fire. See R. 1326. Presumably, one is suppose to figure this out from the types of rounds listed and the velocities listed for some of the rounds. However, velocities and barrel lengths are not listed for all of the rounds. The chart indicates that some tactical vests alone will stop some rounds shot out

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as they were. The first statement referred to the fact that only two members even vaguely recalled receiving any brochure with their Armour vests. See R. 2674 (Bartell) & 4323-24 (Roberts). Cf. Brief of Appellant at 7; R. 1521. The second statement referred to the DuPont brochure or "facts book," not the Armour brochure. Cf. Brief of Appellant at 19. In fact, two members of the SWAT team testified that they thought they had seen a DuPont facts book or something like it but weren't sure, R. 2732-33 (Billings) & 4359-60 (Roberts), as did Jerry Pope, a member of the canine unit, R. 2419-20, 4169. The plaintiff agrees that the SWAT team reviewed brochures before the vests were purchased. Some thought they had probably seen an Armour brochure or one like it, but no one could say for sure that they had seen one. See R. 2582-83 (T. House), 2674 (Bartell), 2736-37 (Billings), 2763 & 2795 (Minor), 3940, 3948-49 (Fowlke), 4270 (W. Jorgensen), 4396-97 (Roberts). Thus, there is a genuine issue of material fact as to whether or not Lt. House saw one.

of 18-inch barrels. R. 1326. No barrel length or velocity is listed for the 30.06, the type of weapon everyone agrees Lt. House's vest was bought to stop at point-blank range. The chart simply indicates that the tactical vest with the insert will stop a 30.06 but does not say that the vest alone will not stop a 30.06 at any distance or that it will not stop another, smaller caliber at a greater distance, such as the .30 caliber carbine round that killed Lt. House. Another SWAT team member testified that the tables in the brochures did not indicate to him that velocity clearly was a factor in the level of protection. R. 3244-46 (T. House).

The defendants suggest that Lt. House should have been able to figure out his vest's limitations from the information provided because he was a well-trained officer and a weapons instructor. However, there was no evidence that any of Lt. House's training involved body armor. In fact, just the opposite was true. See, e.g., R. 2471 (T. House); 2699-2700 (Billings); 2801 (Minor); 4227, 4263-65 (W. Jorgensen); 4338 (Roberts); 4721 (Larson).[20]

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[20] Moreover, Jerry Pope testified that none of his training as a correctional officer or Category I peace officer involved the use of body armor, R. 2372, that he has never had any training in the capabilities or use of vests, R. 2415-16, and that none of his training with other law enforcement officers instructed him as to what body armor would and would not do, R. 4186. Will Fowlke, who was in charge of training, testified that the SWAT team's only training on vests consisted primarily of "some sessions where vendors came in and explained their product." R. 4059; see also R. 3961-63, 3967. The only training they received on vests was instructions not to wash them. R. 2648 (Bartell); 2772, 2803-4 (Minor). Even today, Corrections does not give a class on body armor. R. 3972 (Fowlke).

The evidence showed that the officers' only training as weapons instructors was in caring for and shooting their weapons. R. 3965-66 (Fowlke); R. 2468-69, 3145-46, 3180-81 (T. House). It did not include any training in ballistics. R. 4375 (Roberts). They did not receive any training on the velocity of bullets or the bullet-stopping capabilities of vests. R. 4167 (Pope); R. 4264-65 (W. Jorgensen).

The defendants suggest that Lt. House should have known that his vest without the plate would only stop a .44 magnum at point blank range and that a rifle round has a greater velocity than a .44 magnum and that he should therefore have concluded that his vest without the plate would not stop rifle fire. However, Will Fowlke, who was responsible for Fred's training as a weapons instructor and was a weapons instructor himself, testified that he was not an expert on body armor, velocities of bullets, the effect of barrel length on velocity or the penetrating effect of various rounds at various velocities. R. 3949-50, 4019-20. These things are not part of their training as weapons instructors. See R. 4167 (Pope).[21]

The defendants claim that the SWAT team members knew that vests would not stop rifle fire and that Lt. House's vest without the plate provided the same protection as their vests. However, at least three SWAT team members testified under oath that they thought their vests without the plate would stop at least some rifle fire. Will Fowlke, one

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[21] Fowlke, for example, could not recall the velocity of a .44 magnum, R. 4055, and could not even guess at the velocity of an AR 15 rifle. R. 3962. There is no evidence that Lt. House had any more training in ballistics and vests than Fowlke did. R. 4081 (Fowlke).

of the "main players" in the acquisition of the vests, thought his vest would protect him from some rifle fire, R. 3944-47, 4057-58 & 4072, as did Mark Roberts, R. 4365 & 4380, and Tom House thought all the vests would stop a 30.06 but that Fred's vest, with the plate, would stop a 30.06 at point blank range and still prevent serious injury from blunt trauma (that is, trauma to the body from a bullet hitting but not penetrating the vest), R. 2547-48, 2555-57.[22]

The defendants' argument that the SWAT team all knew what Lt. House's vest would and wouldn't do is belied by their reactions when Lt. House was killed. Even members who said they knew that Lt. House's vest without the plate would not stop rifle fire testified that they thought Lt. House's vest should have stopped the rifle round that killed him and were shocked that it did not. See, e.g., R. 4273-74, 4289 (W. Jorgensen); 2625, 2651 (Bartell); 2712, 2739, 2741 (Billings). See also R. 4798-4800 (Larson); 4385 (Roberts); 4006, 4077 (Fowlke); 4178 (Pope).[23]

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[22] Wayne Jorgensen thought his vest would protect him from carbine fire, R. 4289, the type of round that killed Lt. House, and several members thought that Lt. House's vest without the plate offered more protection than their vests, R. 2616-17, 2659, 2661-62 (Bartell); 2735-38 (Billings); 3954 (Fowlke); 4325 (Roberts). Karl Bartell thought that if a rifle round missed the plate in Lt. House's vest, it might penetrate but it still would not "do much damage." R. 2667-68.

[23] For example, Will Fowlke testified that Lt. House's vest "did not do what it was supposed to," R. 4006, and that it was "a shock that . . . the Cadillac vest didn't perform," R. 4004. Wayne Jorgensen said that Lt. House would "have been damn surprised" that a .30 caliber carbine round at 70 yards went right through him. R. 4242 & 4273-74. When asked if a vest that would stop a .44 magnum at point-blank range should stop a .30 caliber carbine at 70 yards, he replied, "Absolutely." R. 4238. Karl Bartell testified that, when he heard that Lt. House had been shot, he thought that he must have taken a head shot because a shot would not have penetrated his vest. R. 2625.

Finally, the defendants claim that Lt. House told Steve Minor and Lynn Jorgensen that he knew his plate was necessary to stop rifle fire.[24] In fact, those members testified that their understanding of what Lt. House's vest would contain (or their belief about Lt. House's understanding) was based in part on conversations with Lt. House, R. 2776-77, 4650-53, but no one recalled a specific conversation with Lt. House regarding his vest. And other SWAT team members testified differently about Lt. House's knowledge. For example, Wayne Jorgensen testified that, based on conversations and experiences with

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He suggested that the vest alone should have stopped the bullet. See R. 2626 (a ".30 caliber carbine won't come up near the specs of a .44 magnum handgun"). Accord R. 4237-38 (W. Jorgensen). Mark Roberts testified that his vest, without a plate, should have stopped the bullet and that he was "[t]otally stunned that [Lt. House's] vest didn't stop it." R. 4385. According to Roberts, the consensus was that there must have been a problem with the vest because "it didn't do what it was supposed to do." R. 4382. Richard Billings testified that the "big deal" was that the bullet had hit the plate and still penetrated the vest. R. 2741-42. He said that some guys now prefer not to wear vests because they say, "Fred was wearing the best vest we had and so . . . what's the use?" R. 2740. (Karl Bartell, one of the SWAT team members who supposedly knew all about the vests' limitations, is one of those people who now think they would be better off without a vest. See R. 2650-51, 2664-65.)

[24] Lynn Jorgensen testified that he "thought that that would be what [Lt. House] was told." R. 4651. His understanding was based largely on the fact that Lt. House removed the plate for close quarter exercises. R. 4650-53. However, there was substantial evidence that Lt. House never removed the plate from his vest, see R. 2566-67, 3150-51, 3153-54 (T. House); 3955 (Fowlke); 4337-38, 4399 (Roberts), thus raising yet another issue of material fact. Steve Minor testified that he understood, "through what Fred said and what the others were talking about," that the plate was necessary to stop "a high powered rifle" and that, without the plate, Lt. House's vest had the same stopping capacity as the other vests, R. 2776-77, which were supposed to stop a .44 magnum at point-blank range. However, the evidence showed that a .30 caliber carbine, the gun that killed Lt. House, is a low-velocity weapon, not a "high powered rifle," R. 4007 (Fowlke); 4385 (Roberts), and that a vest that could stop a .44 magnum at point blank should stop a .30 caliber carbine at 70 yards, R. 4238 (W. Jorgensen).

Lt. House, he believed that Lt. House thought he was most likely to encounter carbine fire and that his vest without the plate would stop a carbine round, the type of round that killed him. R. 4284-90.[25]

The defendants ask rhetorically, Why was the hard armor insert needed if the vest alone would stop rifle fire?[26] Tom House understood that the plate was needed to stop a 30.06 at point-blank range and to prevent Lt. House from being killed or seriously injured by blunt trauma. R. 2547-48, 2551. See also R. 4274 (W. Jorgensen) (one purpose of the plate was to disperse shock). In fact, the plate was represented to the SWAT team as a "trauma plate." R. 2547-48 (T. House). See also R. 2616 (Bartell) (everyone called it a trauma plate).

It only takes one sworn statement to create a genuine issue of material fact. The testimony of Lt. House's co-workers raises a triable issue of fact as to whether Lt. House adequately understood the capabilities and limitations of his vest.

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[25] Similarly, when Karl Bartell was asked whether Lt. House knew that his vest without the plate would not stop rifle fire, he answered, "We were under the impression where the vest was doubled it should stop pretty much, or at least not penetrate completely through, bullets shouldn't penetrate completely through both thicknesses of the vest." R. 2659.

[26] The trial court apparently found the argument persuasive. The judge noted, "It's a big, awkward, heavy plate. . . . [I]f he believed . . . the vest itself would do it [stop rifles], why in the world would he have packed that thing around for seven years?" R. 1935 at 132. It is not the trial court's role to weigh the evidence on a motion for summary judgment, Hardy v. Prudential Ins. Co., 763 P.2d 761, 765 (Utah 1988), yet that is exactly what the trial court did--literally.

III.

THE SWAT TEAM'S ALLEGED SOPHISTICATION AND KNOWLEDGE DID NOT EXCUSE THE DEFENDANTS FROM THEIR DUTY TO WARN.

The defendants claim they had no duty to warn Lt. House about the limitations of his vest in light of the sophistication and knowledge of the intended user group. Any claim that the SWAT team was a knowledgeable and sophisticated group of officers well versed in body armor is belied by the testimony of the officers themselves. Will Fowlke, for example, testified that they were "a very unsophisticated group. We were a team that was just getting together, breaking into law enforcement . . . ." R. 3970. Wayne Jorgensen testified that he had "no idea" what the bullet-stopping capabilities of his vest were. R. 4270. Richard Billings testified that

> about the only thing we knew at that time was that you generally wanted to carry or wear a body armor that would at least stop what you were carrying . . . .
>
> . . . [T]hat was the kind of lay attitude we had. There was not a lot of information available to us on what the vests were supposed to do . . . .

R. 2708-9.

Several of Lt. House's co-workers testified that they thought they (and other officers in their position) needed more information about what their vests would and wouldn't do. Karl Bartell, for example, testified that, to properly use body armor, people should know what he knows now and more; before Lt. House was killed, they "had not nearly enough information. We needed to know a lot more." R. 2664. See also R. 4005 (Fowlke); R. 4735-36 (Larson).

IV.

WHETHER ARMOUR SATISFIED ITS DUTY TO WARN WAS A DISPUTED ISSUE OF FACT.

The adequacy of a warning is generally a question of fact. E.g., Berry v. Coleman Sys. Co., 596 P.2d 1365, 1369 (Wash. Ct. App.), review denied, 92 Wash. 2d 1026 (1979). The only information Lt. House possibly received from Armour was its brochure and label. Armour claims that, as a matter of law, the brochure and label sufficiently warned users of the vest's limitations because anyone reading them would realize that the vest alone would not stop rifle fire and that a person should not take any action in reliance on his vest that he would not take without his vest, even though neither the brochure nor label says either of those things. As shown above, the brochure was inadequate to advise Lt. House of his vest's limitations. See supra pp. 15-16. The label was no better.

The defendants claim that the label adequately warned users of the vest's limitations because it listed barrel lengths for some of the rounds it would stop.[27] There

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[27] The defendants claim that all the rounds listed on the label are handgun rounds except for buckshot, which is shot from a shotgun. In fact, a 9mm 124-grain full metal jacket round and a .38 caliber round, both of which are listed on the label without any limitation on barrel length, can be shot from a carbine or rifle, R. 2573 (T. House), and, according to Armour's president, the vest should stop them. R. 1444-49. The defendants dispute the plaintiff's statement that Lt. House attended a demonstration in which he fired a 9 mm carbine at a vest like his own, claiming that the weapon was a 9 mm submachine gun, not a carbine. In fact, the weapon was a Heckler & Koch MP5, which Wayne Jorgensen described variously as "a fully-automatic 9 mm submachine gun," R. 4234, and "a single-shot or a fully automatic 9 mm carbine," with a "12-inch barrel on it." R. 4283. (By Jorgensen's definition, a carbine is bigger than a handgun but smaller than a rifle, with a barrel of 16 inches or less. R. 4289.) A vest like Lt.

is no label on the plate, the item that was supposedly for stopping rifle fire. R. 2540 (T. House) & 4083 (Fowlke). Moreover, the label on the vest does not specify barrel lengths for all of the rounds. More important, as Will Fowlke observed, the vest does not say what the vest will not contain (other than armor-piercing rounds). R. 3958-59. Fowlke understood that the barrel lengths were simply "an industry standard" for the type of weapon listed. R. 3958. He understood the label to mean that the vest would stop a .44 magnum (for example) shot from a standard handgun but that "it would be questionable" whether the vest would stop the same round shot from a different weapon. R. 3958. From the label, Fowlke would expect the vest to stop a .30 caliber carbine round, the round that killed Lt. House. R. 4081.

Jerry Pope testified that he learned from his own investigation that vests don't stop rifles, yet when he read the label on Lt. House's vest, he thought the vest should stop a .30 caliber carbine. R. 2389. The only rounds the label expressly excludes are "AP" or armor-piercing rounds, so Pope "would think it would stop everything up to an AP round." R. 2389.

Mark Roberts testified that even though he would be nervous facing a 30.06 because it is not listed on the label, he still would not expect a 30.06 to go through the vest, although he might be seriously injured from the force of the shot.[28] R. 4332.

House's without a trauma plate stopped the 9 mm carbine. R. 4284 (W. Jorgensen).

[28] Roberts also testified that he thought the vest would stop a knife, even though the label does not mention knives. R. 4331. From the label he also would have thought the vest would have stopped the shot that killed Lt. House. R. 4331-32.

Tom House thought the label meant that the user would be "insured survivability" if he were hit by any of the threats listed on the vest but that he could be killed by blunt trauma if he were hit with a round not listed on the vest. R. 2555-56, 2572-73, 2577. He thought the rounds listed on the label were only representative of the types of rounds his vest would contain. R. 3275. He noted that there is "a whole lot of information" that is not on the label, including information about the type of powder, how much powder and velocity. R. 2572.

Finally, a jury could reasonably infer that Lt. House was not adequately warned about his vest's limitations from the testimony of his co-workers, who testified that, after reading the Armour brochure and label, they would have expected Lt. House's vest to stop the round that killed him. See supra p. 18.

V.

DUPONT HAD A DUTY AND OPPORTUNITY TO WARN LT. HOUSE OF HIS VEST'S LIMITATIONS, AND IT WAS FOR THE JURY TO DECIDE WHETHER DUPONT BREACHED THAT DUTY.

DuPont claims that it had no duty or opportunity to warn vest users about the limitations of their vests. It claims that it simply manufactured a fiber that was processed by others into fabric that was then made into vests. Other courts, however, in analagous cases, have rejected the argument that DuPont, as a bulk supplier of fiber, had no duty to warn as a matter of law. Hegna v. E.I. duPont de Nemours & Co., 806 F. Supp. 822, 824-29 (D. Minn. 1992); Forest v. E.I. DuPont de Nemours & Co., 791 F. Supp. 1460, 1465-67 (D. Nev. 1992). Moreover, the evidence shows that DuPont is one of the

major, if not the major, player in the soft body industry. DuPont helped develop labeling standards. Armour Brief at 44. It controls who can make vests out of Kevlar and has threatened to withhold Kevlar from manufacturers who did not make their vests according to its specifications. R. 1667-69, 1781-82. DuPont's concerted activity with Armour and other vest manufacturers in determining labeling and testing standards and specifying manufacturing standards can give rise to liability. See Hall v. E.I. DuPont DeNemours & Co., 345 F. Supp. 353, 379, 381 (E.D.N.Y. 1972). DuPont's own employee said that DuPont would be "grossly irresponsible" if it had knowledge of problems with vests and failed to communicate that knowledge to law enforcement officers. R. 1663.

DuPont's claim that it had no opportunity to warn vest users is belied by its own actions: DuPont has produced and distributed at least three "facts books" educating officers about Kevlar-based soft body armor and produced at least three video tapes. Only two SWAT team members even vaguely recall seeing a DuPont facts book, see supra note 19, and none recalls ever seeing a DuPont video, see R. 3984 (Fowlke); 4227 (W. Jorgensen); 4643-46 (L. Jorgensen); 4377-78 (Roberts); 2736 (Billings). Under these circumstances, whether DuPont's efforts to distribute this information were reasonable and satisfied its duty to warn was for the jury to decide.

Finally, DuPont argues that, if it undertook any duty, it was only to provide accurate information, which it did. However, one could conclude that the information DuPont distributed was misleading. For example, DuPont helped disseminate material perpetuating the myth that body armor can make an officer a Superman. See R. 1660-61.

The cover of its facts book shows a bullet bouncing off a vest. R. 1337. Bullets do not bounce off vests. R. 2314, 3657. The chart in DuPont's facts book indicates that level III and IV vests will stop rifle fire, without any indication that a hard armor insert is needed. R. 1332. Although the text says that soft body armor is not designed to protect against rifle fire, it suggests that some vests--heavier, tactical vests--can stop rifle fire. It says that these vests "[t]ypically" (but not always) contain hard armor inserts and additional Kevlar, R. 1340, suggesting that additional Kevlar alone may be sufficient to stop rifle fire, and Lt. House's vest was supposed to have more Kevlar than the other vests, e.g., R. 2611, 2616, 2663 (Bartell). Moreover, one of DuPont's videos does not say that hard armor is necessary to stop rifles. R. 4655-56 (L. Jorgensen).[29] Thus, whether DuPont satisfied whatever duty it had was a disputed fact question.

VI.

WHETHER LAWCO GAVE AND BREACHED A WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE ARE DISPUTED ISSUES OF FACT.

Defendant Lawco Police Supply claims that there is no credible evidence that it gave or breached any warranty of fitness for a particular purpose.[30]

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[29] Based on the video, Lynn Jorgensen thought some vests alone can stop rifle fire. R. 4659. DuPont claims that the video was not DuPont's Protecting Society's Protectors. Armour Brief at 43 n.24. The record is not clear on this point, see R. 4642-48, 4654 (L. Jorgensen), but it appears to have been distributed by DuPont.

[30] Lawco notes that the parties have stipulated that no one recalls any conversation between Lawco and the Department of Corrections; however, the fact that no one recalls the specifics of any conversation with Lawco does not mean that no conversations took place. Some witnesses recalled generally discussions or presentations by Lawco in connection with the SWAT team's purchase of vests. E.g., R. 3939, 3968,

Lawco claims that no warranty arose because Lt. House's vest with its hard armor insert was not sold for anything other than its ordinary purpose, namely, to stop rifle fire. The evidence clearly shows, however, that there are different protection levels even for tactical vests with inserts. See, e.g., R. 1326. Lt. House's vest was specifically acquired to stop a 30.06 at point-blank range. See R. 2610 (Bartell); R. 4364 (Roberts).[31]

Lawco claims that no warranty arose because there was no evidence that the purchaser relied on Lawco's skill or judgment. In fact, Karl Bartell testified that "the guy we bought the vests from" "literally sold us on the vest as being the . . . best that money can buy." R. 2609. He asked the team members:

> "[W]hat does your team need?" And we explained everything to him, what our team was going to be doing . . . and he says, "Okay. There are several categories." And he says, "You want the best. You want the Cadillac of vests. You don't want this one, this one down here on the line, you want the best." And we said, "Yes." And he says, "What is the most powerful rifle? What is the most powerful weapon that you have to stop?" And we told him, "We have two 30.06s that the sniper squad has that we will need to stop." And then he says, "This vest, then, will do for the team members and you want this vest for whoever is the point man." And we at that time knew who our point man was, which was Fred. So Fred was measured and we bought the one vest for him that was supposed to stop that .06.

3985 (Fowlke); 2765-67 (Minor); 3272-73 (T. House). The prison dealt with Lawco, R. 3940 (Fowlke), 2537 (T. House), but the team members had a hard time remembering which salesmen represented which companies, R. 2538, 3273 (T. House) & 2668 (Bartell).

[31] The SWAT team told the sales reps that they were "looking for the best." R. 2605 (Bartell). Mark Roberts testified that they told the salespeople that they wanted a vest that would stop a 30.06. R. 4364. He further testified that the team "didn't know any specifications" but they "did specify that we needed something heavier" for the point man and "that's what they [the salemen] came up with." R. 4325.

R. 2609-10. See also supra note 31. Mr. Bartell could not remember whether the "guy" was from Lawco or Armour, see R. 2619-20, 2668,[32] but a jury could reasonably conclude, from the fact that Lawco visited the prison regularly and apparently made at least one presentation to the SWAT team on body armor, that the SWAT team relied on Lawco's skill and judgment in deciding what vest to buy for Lt. House.

Lawco suggests that the SWAT team could not have relied on Lawco because the prison was required to buy the vests from the lowest bidder. However, the evidence suggests that the prison relied on Lawco in determining what vest to buy. See R. 2609-10 (Bartell). The fact that it then solicited bids does not negate its reliance and does not preclude a warranty where, as here, Lawco was also the lowest bidder.

Lawco claims that there was no credible evidence that it warranted that the vest would perform in a way for which it was not designed, that is, that Lawco warranted that the vest without the plate would stop a 30.06. Whether Lawco made such a representation is irrelevant to the plaintiff's breach of warranty claim because the bullet that killed Lt. House (a lesser threat than a 30.06) actually hit the plate, and it was expressly represented to the SWAT team that if a bullet hit any part of the plate, the plate would stop it. R. 2617 (Bartell). See also R. 4008 (Fowlke); 4799 (Larson); 2627-28 (Bartell). Moreover, at least one member testified that he believed, based on the representations made by the sales people who sold them the vests, that Lt. House's vest

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[32] Will Fowlke also recalled the presentation and thought it was put on by Lawco. R. 3939.

without the plate would stop a 30.06, though not at point-blank range and not without risk of significant injury from blunt trauma. R. 3271-72 (T. House). Thus, there is at least a triable issue of fact as to whether the vest and plate failed to perform as Lawco warranted they would.

CONCLUSION

Genuine issues of material fact precluded summary judgment for the defendants. The summary judgments should therefore be reversed.

DATED this 20th day of January, 1994.

SUITTER AXLAND & HANSON

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(Original signature)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the above and foregoing **REPLY BRIEF OF APPELLANT** were hand-delivered this 20th day of January, 1994, to:

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